80-404

No. .....

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1980

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

vs.

H. H. HENDERSON, DWAINE LEE HENDERSON, AND ELIZABETH RILES STEVISON, ADMINISTRATRIX OF THE ESTATE OF GRADY H. STEVISON, DECEASED.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented by this petition are:

1.

Did there exist any replacement coverage on the new 1972 GMC Truck, Serial No. V-504642, undisputedly covered by insurance contract No. C 205187, $10,000.00 for one injury, said coverage having been paid under that insurance contract issued November 10, 1971?

2.

Did the United States Court of Appeals for the Fifth Circuit commit error in following the District Court in permitting multiple added complaints with changed positions and not dismissing all of that contained in pleadings through order of August 15, 1977, and at the same time permitting an additional insurance contract to be identified and substituted in the same action when the first two pleadings had identified premises coverage and not public liability coverage on motor vehicles?

3.

Did the District Court have right and authority to activate or assist in making activation of contract of insurance on August 15, 1977, when the contract had expired of its own terms as of November 7, 1971?

4.

Is petitioner entitled to judgment as a matter of law or, in lieu thereof, is it not entitled to have the judgment as entered set aside and held for naught?

5.

Did the United States Court of Appeals for the Fifth Circuit have right and authority to set aside and hold for naught the judgment of the District Court that no punitive damages are allowable when the District Court heard all of the witnesses and saw their demeanor and held there was no right of punitive damages and decided for petitioner, with the panel of judges of said Fifth Circuit having only read the record to reach a different conclusion?

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H. H. HENDERSON, DWAINE LEE HENDERSON, AND ELIZABETH RILES STEVISON, ADMINISTRATRIX OF THE ESTATE OF GRADY H. STEVISON, DECEASED.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 19, 1980.

OPINIONS BELOW

The Circuit Court of Greene County, Mississippi, entered judgment in the sum of $100,000.00 and the Supreme Court of Mississippi affirmed the judgment (Cause No. 48,529 Supreme Court of Mississippi, H. H. Henderson and Dwaine Lee Henderson vs. Mrs. Elizabeth Riles Stevison, Administratrix of the Estate of Grady H. Stevison, Deceased). The final judgment of the Circuit Court of Greene

County, Mississippi, evidencing the payment of the amount of the judgment paid by United States Fidelity and Guaranty Company appears as Exhibit "L" to the Second Amended "Declaration" filed by respondents in the United States District Court (R. 244) (A1), Appendix 1 hereto, and which judgment is dated June 17, 1976, and relates only to United States Fidelity and Guaranty Company insurance contract No. C 205187.

The respondents filed in the United States District Court for the Southern District of Mississippi, Hattiesburg Division, action against United States Fidelity and Guaranty Company and therein identified as additional coverage in pleadings insurance contract No. 2CC 637846, which was a premises liability policy and in no way protected respondents or either of them on the $100,000.00 judgment in the State court; and after answer was filed to the first pleading, an amended complaint was authorized pursuant to order of the court therefor dated July 19, 1976 (A5) Appendix 2 hereto. On August 5, 1976, amended pleading was filed and identified insurance contract No. 2CC 512726 and No. 2CC 637846, both of which contracts related to premises coverage and not public liability coverage, with demand for recovery not only of $50,000.00 identified in the two premises policies but also for punitive damages (R. 54-55); and in said amended pleading as Exhibit "B" thereto is the original premises policy which was renewed by said contract No. 2CC 637846, which discloses coverage only of premises and referred to Manufacturer's and Contractor's Liability Insurance as disclosed through copy thereof attached hereto as Appendix 3 (A7); and after answer was filed to that "Amended Declaration" which was filed as of August 5, 1976, another order of the court was obtained for a second amendment and in that order dated August 15, 1977, the court sustained position of petitioner as to both contracts No. 2CC 512726 and No. 2CC 637846 and the

court dismissed with prejudice any claims which the respondents may have under said insurance contracts, and with no basis therefor there was the second amendment authorized to identify insurance contract No. C 3111037, and a copy of the order of the court appears as Appendix 4 thereto (A8); and pursuant to the order authorizing the "Second Amended Declaration" such was filed to claim for the first time this contract No. C 3111037 with statement that respondent, H. H. Henderson, was under the impression that all was covered in insurance contract No. 2CC 512726 (R. 244); and to that "Second Amended Declaration" filed in said District Court, answer was filed and which case was tried to conclusion with judgment thereon dated June 27, 1978 (R. 476), and the court therein recognized that no premium had been paid on the attempted substituted policy and the court simply deducted the unpaid premiums from the $50,000.00 award of the jury, and the judgment ignored and found against respondents on the punitive damages and fixed the actual damages at $49,707.00, and a copy of the judgment of the court in this regard appears as Appendix 5 (A10).

Motion for new trial or corrected judgment was filed on June 26, 1978, and amendment thereto was filed on June 27, 1978, and copies of the amended motion and of order of the court overruling the original and amended motions appear hereto as Appendix 6 and 6-A (A12 and A15). From this final order of the court there was appeal duly completed to the United States Court of Appeals for the Fifth Circuit and there said court entered opinion affirming the District Court on direct appeal and reversing the trial court on cross-appeal wherein punitive damages have been sought and the cause remanded to the District Court for further proceedings on the punitive damages feature wherein in the first instance the punitive damages were

eliminated by the trial judge aforesaid, and a copy of the opinion of the Fifth Circuit, dated July 3, 1980, appears hereto as Appendix 7 (A16). Copies of all of said opinions are appended to this petition at the appendix pages indicated.

JURISDICTION

Jurisdiction to review these orders and action of the said District Court and of said Court of Appeals by writ of certiorari is conferred upon this Honorable Supreme Court under Title 28, U.S.C., Sections 1254(1) and 2101(c) and (f).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDERS INVOLVED

That had and done by the trial court and in the Fifth Circuit violates Section X of the Constitution of the United States and particularly that part thereof which prohibits the impairment of the obligations of contracts; and the opinion entered is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; and there are involved the judgment and order of the Circuit Court of Greene County, Mississippi, and the Supreme Court of Mississippi as related to primary insurance coverage on said 1972 GMC Truck (Appendix 1, A1); and the United States Court of Appeals for the Fifth Circuit, as related to punitive damages, violated its own orders and there is conflict therein as disclosed through the case of *Marcum v. United States of America*, Cause No. 78-2248, decided by the United States Court of Appeals for the Fifth Circuit on July 9, 1980, copy which appears hereto as Appendix 8 (A33).

STATEMENT OF THE CASE

A.

Jurisdiction

In the United States District Court, Jurisdiction was based upon diversity of citizenship existing between the respondents, all Mississippians, and United States Fidelity and Guaranty Company, a non-resident corporation, under the authority of Title 28, U.S.C., Section 1332.

B.

Pleadings and Proceedings

In the foregoing, effort has been made to disclose facts constituting basis for complaint made to that had and done in the United States District Court and followed by the United States Court of Appeals for the Fifth Circuit. Additionally, we have sought to point out that the United States District Judge heard the case in its entirety and denied any right of recovery for punitive damages; but the Fifth Circuit reversed the trial court in this regard. Appendix 7 (A16) hereto is copy of the opinion of the appellate court. There was filed petition for rehearing en banc and which was overruled because of failure to activate a needed judge under the Fifth Circuit Rules for consideration by the Court en banc of that presented in petition for rehearing en banc. Petitioner appeals from a denial of said petition challenging that done by the United States Court of Appeals for the Fifth Circuit affirming the cause as to the monetary award and remanding the case for trial on the punitive damage issue.

In a trial on the merits the United States District Court permitted recovery on theory that there became the contractual liability of United States Fidelity and Guaranty

Company by substitution of coverage from one insurance contract to another, and this in spite of the fact that the original pleading in the District Court sought to make application of a premises coverage and in amendment to the pleadings sought to name another premises policy and it was not until a motion was filed for summary judgment in the District Court when respondents for the first time were placed on notice that the policies constituting their claims in the original complaint and in the first amendment thereto related solely to premises coverage and not to automobile liability insurance.

Respondents sought to contend that the insurance contract on the 1972 GMC truck 10/20/10-M limits, was not intended to be a public liability automobile policy on said 1972 GMC truck, even though that insurance contract specifically identified the 1972 GMC Truck by Serial No. V-504642, and which contract bore No. C 205187. The original complaint in the United States District Court only identified insurance contract No. 2CC 737846, and it was disclosed through appropriate pleadings in said District Court that said policy No. 2CC 637846 did not apply to bodily injury or property daamge related to ownership or use of automobiles. When this was called to the attention of the opposition and the court, the order was entered on motion therefor authorizing amendment to the original complaint filed in the action where the plaintiffs contended that policy No. 2CC 637846 should have been extended through custom without timely payment of premium to cover the 1972 GMC tractor-truck (R. 55). This is a Manufacturer's and Contractor's Liability Insurance policy (Appendix 3, A7). Copy of that policy proper appears beginning at page 123 of the record; and when the amended complaint and answer thereto and motion for summary judgment were filed, the court did dismiss with prejudice claims made under contract No. 2CC 512726 and No. 2CC

637846, and the order is dated August 15, 1977, authorizing the plaintiffs, respondents here, to remain in the same action and file amended pleading to substitute contract No. C 3111037 (Appendix 4, A8). The accident had occurred on November 23, 1971, almost six years prior to authorizing filing of the second amended pleading. The second amended pleading seeks to activate contract No. C 3111037, which was a $50,000.00 policy for one injury. It was claimed by petitioner that this policy described a motor vehicle totally different from the motor vehicle involved in the accident and that the policy expired as of its own terms on November 7, 1971, but the claim was made by respondents that under practice there should have been an extension of time for paying premium by a local agent named Sigler, with admission by respondent, H. H. Henderson, that he never paid any premium on said contract.

The trial judge reversed his position first taken wherein the court had apparently concluded that the case of *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.*, (Miss.) 191 So. 415, would control in favor of the defendant, petitioner here. It was then that the court did grant instructions of the jury which were peremptory in effect to thereby reach an erroneous end.

C.

Statement of Facts

There is no dispute but that United States Fidelity and Guaranty Company did issue insurance policy No. C 205187 to cover the 1972 GMC Truck involved in the accident. Petitioner concluded that insurance policy No. C 3111037 issued by Sigler Insurance Agency on a 1969 Chevrolet Truck extended no coverage whatsoever to the 1972 GMC. The trial court recognized the second amended pleading as long and out of order as related to Federal

Practice. On inquiry of the trial court, it was agreed by respondent, H. H. Henderson, that policy No. C 3111037 did cover the motor vehicle therein identified. This was a 1969 Chevrolet truck and the policy was amended to cover a 1971 Chevrolet truck. It is true that local agent, James Sigler (R. 2-58) never issued any contract on the new 1972 GMC, and the policy No. C 3111037 covered a 1969 Chevrolet truck and then substituted a 1971 Chevrolet truck, but effort was being made by respondents to cause this contract to extend coverage to the 1972 GMC (R. 16). Notice of non-renewal was given on policy No. C 3111037 (R. 34, Vol. III of record). No notice was given of renewal or extension of application or purchase of new equipment. There was recognition of the substitution of the 1969 Chevrolet truck to the 1971 Chevrolet truck (R. 41). The general agent of petitioner had requested the local agent Sigler not to issue insurance on the motor vehicle described in contract No. C 3111037. That contract expired November 7, 1971, and no renewal premium was ever paid by Henry Hosey Henderson (R. 55). Henderson admitted that he knew there existed the $10,000.00 coverage for one injury on the motor vehicle involved in the accident (R. 76). The trial court heard all of this and stated: "Well, of course, if he didn't pay the premium on it the company is under no obligation to carry him and the policy would be automatically cancelled." (R. 117).

In short, it should be stated that on November 10, 1971, H. H. Henderson purchased a new 1972 GMC truck, Serial No. V-504642, from a sales agency at Mobile, Alabama, financed through General Motors Acceptance Corporation, and Mr. Henderson obtained coverage for $10,000.00 for one injury under insurance contract of United States Fidelity and Guaranty Company bearing No. C 205187. It was concluded by all that this was the only coverage

Henderson had on the motor vehicle, but there was the death case and a jury verdict for $100,000.00. When the Supreme Court of Mississippi affirmed the trial court and assessed damages of five percent plus penalties and interest, same was paid and satisfied as disclosed through copy of the judgment of the Circuit Court of Greene County, Mississippi, appearing hereto as Appendix 1 (A1).

On May 10, 1976, the respondents recognized the foregoing and in action filed sought to recover under premises contract No. 2CC 512726; and in the same original pleading contract No. 2CC 637846 is identified and in said original pleading in paragraph numbered IX thereof the parties respondent stated that contract No. C 3111037 "is in no way connected with the coverage claimed and coverage herein involved." (R. 4-5). A copy of said paragraph numbered IX in said original pleading appears hereto as Appendix 9 (A47). After the first amended pleading and motion for summary judgment thereunder, for the first time, and after it had been contended for the respondents that said contract No. C 3111037 was in no way connected with the coverage in the case, there was an about face with order of the court dated August 15, 1977, permitting the second amended pleading to identify said contract No. C 3111037.

There followed the jury trial with all of the mixtures in the pleadings based on the policy which, as stated in the original Federal Court pleading and the first amendment thereto, had no application. The respondents were not claiming thereunder.

ARGUMENT

Absent the punitive damages facet of this lawsuit, which will appear last in this argument, the petitioner has four contentions and they are (1) that the new 1972 GMC truck Serial No. V-504642, was covered by insurance contract No. C 205187, $10,000.00 for one injury, said coverage being undisputedly paid under that insurance contract issued November 10, 1971, and there exists no replacement coverage; (2) the Fifth Circuit erred in following the District Court in permitting multiple amended complaints and not dismissing all of that contained in pleadings through Order of August 15, 1977, and permitting an additional insurance contract to be identified in the same action; (3) the District Court had no right or authority to activate or assist in making activation of a contract of insurance on August 15, 1977, when the contract had expired under its own terms as of November 7, 1971; (4) the petitioner is entitled to judgment as a matter of law or in lieu thereof the judgment as entered should be set aside and held for naught; and lastly, (5) the Fifth Circuit had no right or authority to overrule the opinion of the trial court and remand the case for hearing on question of punitive damages.

I.

The new 1972 GMC truck, Serial No. V-504642, was covered by insurance contract No. C 205187, $10,000.00 for one injury, said coverage being undisputedly paid under that insurance contract issued November 10, 1971, and there exists no replacement coverage.

Said insurance contract No. C 205187 was issued by a United States Fidelity and Guaranty Company local agent at Hattiesburg, Mississippi, approximately 90 miles

away from Meridian, Mississippi, where the main offices of the company are located. The Sigler Insurance Agency, a local agency, was 60 miles away from the main area; and if we are in error as to this sole exposure of United States Fidelity and Guaranty Company, then that company is entitled to reduction of the asserted claim against it by the $15,328.80 paid under the order of the Circuit Court of Greene County, Mississippi, plus the unpaid premium which United States Judge Cox mentioned. The $15,328.80 was tendered on August 5, 1976. Answer was had to the tender in the State court and an agreed order in the State court discloses the acceptance of $15,328.80 (Appendix 1, A1). The Fifth Circuit said of this:

> "Under Mississippi law, soliciting agents had no authority to waive any provision of automobile liability policy or to receive from insured a summons served upon insured so as to comply with notice provision of automobile liability policy where policy provided that notice to any agent or knowledge possessed by any agent shall not effect a waiver or change of any part of the policy or estop the company from asserting any right under the policy." *Prassel Enterprises, Inc. v. Allstate Insurance Co.*, (5th Cir.) 405 F. 2d 616, 617.

> "In absence of a provision for extension of coverage of automobile liability or indemnity to automobiles other than those described in policy, the insurer does not cover the insured's liability resulting from use of such other automobile." *American Ins. Co. of Newark, N.J. v. North Side Metal,* (USDC, Ill.) 162 F. Supp. 72.

As heretofore indicated, the parties are bound by their pleadings.

> "Generally speaking, 'a policy of liability insurance covers any and all liabilities or losses for which insured

is lawfully liable, that it is apparent were within the intention of the parties, as expressed in the terms of the policy, and is construed by the general rules of construction, and it cannot be extended to liabilities or losses which are neither expressly nor impliedly within its terms.'" *Employers Liability Assur. Corp. v. C. E. Carnes & Co.*, (5th Cir.) 101 F. 2d 739.

The opinion of the Fifth Circuit about which we are here making complaint is in contradiction of the last two foregoing opinions and should be construed under the authority of *Erie R. Company v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, generally referred to as the "Erie Doctrine." The laws of the state should control in diversity actions as here involved.

"If insurance contract is in plain and unambiguous language, it should be construed as written in same way as any other contract." *Key Life Insurance Co. of South Carolina v. Tharp*, (Miss.) 179 So. 2d 555.

"In absence of a provision for extension of coverage of automobile liability or indemnity to automobiles other than those described in policy, the insurer does not cover the insured's liability resulting from use of such other automobile." *American Ins. Co. of Newark, N.J. v. North Side Metal*, (USDC, Ill.) 162 F. Supp. 72.

No notice was ever given to F. W. Williams State Agency of Meridian, Mississippi, primarily handling United States Fidelity and Guaranty Company business in Mississippi, that there was in existence any replacement coverage. In fact, it is apparent from the pleadings that neither the plaintiffs nor the attorneys had any knowledge of any effective or applicable replacement coverage until after the amended complaint was challenged by motion as to the insurance contracts therein identified, and the Court sus-

tained motion to eliminate all of the contracts therein contained because they did not have application to automobile coverage (R. 192).

II.

The Fifth Circuit erred in following the District Court in permitting multiple amended complaints and not dismissing all of that contained in pleadings through order of August 15, 1977, and permitting an additional insurance contract to be identified in the same action.

We are here simply contending that the Court went beyond existing authority to permit the handling had and done in this litigation. In the first place, none of the pleadings conform to Federal Rules of Civil Procedure affecting District Courts of the United States, but there should come a time when there will be abuse of judicial process or undue repetition with excessive discovery. In this case not even the lawyers knew before August 15, 1977, that the insurance contract not renewed because of failure to pay premiums did not relate to automobile coverage; and we believe that the Court had no right or authority at that late date to permit another amended pleading involving an entirely different insurance contract. This handling would be impossible in most courts in this nation. The original and first amended pleadings relate to premises coverage and in no way to motor vehicular coverage. The amendment last made relates to insurance contract No. C 3111037 and a 1971 Chevrolet truck, not involved in accident in this case. That truck was allegedly involved in an accident on November 2, 1971, and was owned by H. H. Henderson at the time he bought the new 1972 GMC tractor-truck, Serial No V504642, purchased by him on November 10, 1971. Contract No. C 3111037 covering the 1971 Chevrolet motor

vehicle expired on its own terms on November 7, 1971. In this area of concern, there are two reasons why there can be no coverage under that contract. In the first place, the specific motor vehicle involved in the accident was covered by the 10/20/19-M contract No. C 205187 and all liability thereunder was paid and satisfied by the payment of the $15,328.80 to satisfy the exposure under that contract as against the $100,000.00 verdict and judgment in the Circuit Court of Greene County, Mississippi (Appendix 1, A1). The Circuit Court of Appeals for the Fourth Circuit dealt with a similar situation as here involved where the trial judge concluded from the evidence in that case that the new motor vehicle did not replace an old one. The reason therefor was that no notice was given to any insurance agency of application of the replacement notion. This North Carolina court held that there could be no automatic transfer of insurance from one motor vehicle to another "unless the named insured notifies the company within ten days following the date of delivery of such other automobile." *Mitcham v. Travelers Indemnity Co.*, (CCA 4th) 127 F. 2d 27, 29.

Here there were two reasons why there could be no substitution. In the first place, this new motor vehicle was covered by a specific contract issued by Ross-King-Walker of Hattiesburg, Mississippi, bearing No. C 205187. The coverage there provided for was a 10/20/10-M coverage and that contract was in full force and effect when the accident happened and all liability thereunder was paid and satisfied. In the second place, as expressed by the Fourth Circuit in *Mitcham v. Travelers Indemnity Co.*, supra, no proper notice was given of any desire to substitute; and the first notice ever coming into existence of the desire to substitute to place the new 1972 GMC truck under policy No. C 3111037 was August 15, 1977, and that came about in the pleadings filed and nearly six years after the accident

occurred on November 23, 1971. We have always contended in pleadings and briefs that when there is specific coverage and nothing in the contract for extended coverage, that primary coverage is all the coverage existing. The respondents want to keep their $15,328.80, but they want in addition thereto all that may be recovered under this contract No. C 3111037, and which contract had expired under its own terms and was never renewed and no payment of premium has ever been made thereon. The trial judge did think that it was wrong for recovery to be had on a contract out of date with no premiums paid thereon, and in spite of the jury verdict based on his instructions to the jury, he simply entered a judgment and deducted the amount of the premium which should have been paid nearly six years after it was due if Henderson had intended to keep the insurance contract in force.

III.

The District Court had no right or authority to activate or assist in making activation of a contract of insurance on August 15, 1977, when the contract had expired under its own terms as of November 7, 1971.

We again deal with this question of replacement identified in an automobile liability policy. In the case before the Court, the 1971 Chevrolet truck, according to the evidence for the respondents, was involved in an accident on November 2, 1971. It was still owned by H. H. Henderson and not sold by him until two weeks after the accident of November 23, 1971. In other words, he owned this motor vehicle at the time he purchased the new 1972 GMC truck and he did nothing to arrange for any substitution prior to the expiration date of that insurance contract or at any time thereafter. The first time there was any attempt at activation and substitution under insurance contract No. C 3111037 was when the Court permitted the amend-

ment after discharging the position taken by the plaintiffs, respondents here, in the first two pleadings filed in the Federal Court and that was on August 15, 1977 (Appendix 4, A8).

The Missouri Court of Appeals in denying coverage on replacement theory said of this:

> "Nevertheless, not a single case among those ably and carefully discussed in the Cockrell opinion, including Meyers v. Smith, Mo., 375 S.W. 2d 9, Winterton v. Van Zandt, Mo., 351 S.W. 2d 696, and Walker to Use of Foristel v. American Automobile Ins. Co., 229 Mo. App. 1202, 70 S.W. 2d 82, deals with or discusses the failure of the insured to give the notice required by the automomatic insurance provision, and in our view the principles which govern the cases involving failure to give notice of claim or suit, or failure to cooperate in some manner, are not applicable here. The only Missouri cases we have found dealing with the notice requirement of the automatic insurance provision are Mistele v. Ogle, supra, 293 S.W. 2d at 333(5), Missouri Managerial Corporation v. Pasqualino, supra, 323 S.W. 2d at 248-249(3), and Union Automobile Indemnity Ass'n v. Reimann, supra, 171 S.W. 2d at 726, which hold that unless notice of the acquisition of a replacement vehicle is given, coverage of that vehicle terminates at the end of the notice period." *American Standard Insurance Co. of Wis. v. Rider,* (Mo. App.) 475 S.W. 2d 418, 423.

Apparently the most common definition of what constitutes a replacement vehicle is found in a North Carolina case and we quote therefrom as follows:

> "The most commonly accepted definition of what constitutes a replacement vehicle is found in State

Farm Mutual Automobile Ins. Co. v. Shaffer, 250 N.C. 45, 108 S.E. 2d 49, where the court stated:

> " 'It is our opinion that the replacement vehicle is one (1) the ownership of which has been acquired after the issuance of the policy, and (2) during the policy period, and (3) it must replace the car described in the policy, which must be (4) disposed of or (5) be incapable of further service at the time of the replacement. (l. c. S.E. 2d 54) (Numbering supplied.)' " *Beck Motors, Inc., v. Federal Mutual Insurance Co.*, (Mo. App.) 443 S.W. 2d 200, 203.

In the case now before the Court, the 1972 GMC motor vehicle was purchased after the expiration date of the insurance contract No. C 3111037. The 1971 motor vehicle was still owned by Henderson when the policy covering that vehicle expired under its own terms with no premium ever thereafter paid thereon.

In a Texas case dealing with a newly acquired automobile the court announced the applicable law for that court as follows:

> "The notice requirement is a condition subsequent which must be complied with in order to keep the insurance coverage in effect beyond the thirty-day period. Willliams v. Standard Accident Insurance Company, 158 Cal.App. 2d 506, 322 P. 2d 1026. By the clear language of the policy, this thirty-day period begins to run from the 'delivery date'. Husch did not comply with this requirement. For the reasons stated, the Rambler was not covered by the policy at the time Husch's liability to the appellants arose. Mitcham v. Travelers Indemnity Company (Fourth Circuit) 127 F. 2d 27." *Pride v. State Farm Fire & Casualty Insurance Co.*, (Tex. App.) 434 S.W. 2d 146, 149.

IV.

Petitioner is entitled to judgment as a matter of law or in lieu thereof, the judgment as entered should be set aside and held for naught.

In the foregoing we have sought to point out why there can be no recovery in this action. There was insurance on the new truck. The old truck, the 1971 Chevrolet truck, covered by insurance contract No. C 3111037 expired under its own terms and failure to pay premium due as of November 7, 1971. Nearly six years passed after the due date of the premium with no premium ever paid. With no premium paid on the 1971 Chevrolet policy and with premium paid only for a 10/20/10-M policy on the new 1972 GMC motor vehicle, if the replacement were permitted, there would not be a replacement but an addition and the respondents would be receiving, as they have sought successfully to do before the trial judge, and additive of $50,000 over and above the coverage under the specific contract covering the new 1972 GMC truck covered by policy No. C 205187. Based on these facts and the law aforesaid, the Court should have sustained the motion for judgment at the conclusion of all of the testimony and the written peremptory instruction submitted to the Court should have been granted. These were errors on the part of the trial court because petitioner was entitled to judgment as a matter of law. The Fifth Circuit fell into the same pattern of error, probably because of failure to understand what the issues were and what were the real facts.

The trial court overruled motion for judgment. The trial court simply held that he saw no reason why an insured could not have two policies of casualty insurance on the same vehicle with the same insurance company at the same time. He was thus holding that the primary coverage

on the new 1972 GMC could have thereasto replacement coverage under insurance contract No. C 3111037. Paragraph numbered IX of the original complaint, as disclosed through Appendix 9 hereto (A47), claimed that no coverage was expected or intended under contract No. C 3111037 and the first amended pleading was to the same effect and each time these pleadings identified premises coverage and not automobile coverage; and it was not until a motion for summary judgment was filed with the court as against the original and first amended complaints that the plaintiffs, respondents here, recognized that their claim had been made falsely on contracts which in no way covered accidents on the highways of Mississippi or elsewhere and it was then that the court dismissed the original and first amended "declaration" and permitted a second amended pleading to make claim under contract No. C 3111037 at a time when the original pleading and the first amendment thereto ignored this contract of insurance and took the position by positive pleading that it had no application, and this we sought to point out to the trial court and the court on appeal. The trial court did recognize that it was unusual that H. H. Henderson thought that credit for premium should run for nearly six years with no offer ever to pay and with no right of exception thereto. (R. 162-163). See *Prassel Enterprises, Inc. v. Allstate Insurance Company*, supra.

Since the opposition had finally begun to rely on policy No. C 3111037, after it had discarded same and had two pleadings to the contrary in the United States District Court, we sought to measure this deficiency before the trial court and on appeal without success. Other cases following the same pattern as contained in *Prassel Enterprises, Inc. v. Allstate Insurance Company*, supra, are the cases of *American Standard Insurance Co. of Wis. v. Rider*, (Mo.) 475 S.W. 2d 418; *State Farm Mutual Automobile Ins. Co. v.*

Shaffer, (N.C.) 108 S.E. 2d 49, and *Beck Motors, Inc. v. Federal Mut. Insurance Co.*, (Mo. App.) 443 S.W. 2d 200.

V.

The Fifth Circuit had no right or authority to overrule the opinion of the trial court and remand the case for hearings on question of punitive damages.

Under Division (10-13) of the opinion of the Fifth Circuit in this case (Appendix 7, A16), reference is made to punitive damages with the panel of judges concluding that there was jury question. We find no fault with that held in the cases cited, but our view is that the case of *Martin v. Travelers Indemnity Co.*, 450 F. 2d 542, furnishes the controlling thought adverse to the conclusion reached by the Court. Judge Wisdom wrote the opinion as to punitive damages. Numbers 10 and 11 of the syllabi cover the conclusions reached. We quote from Number 10 of the syllabi which states: "Under Mississippi law, liability insurer cannot be found liable in excess of its policy limits for failing to settle action unless its refusal to settle was so arbitrary and unreasonable as to constitute fraud." Under the authority of *Erie R. Company v. Tompkins*, supra, generally referred to as the "Erie Doctrine," the laws of the state control in diversity actions as here involved. Space permitted prohibits elaboration, but there are Mississippi cases which we must cite to the Court in support of that had and done by United States Judge Cox as to punitive damages. As a lawyer once said to this writer, punitive damage under insurance is nearly nil. Under Mississippi law punitive damages, in our view, cannot be assessed here because there exists in the record no showing of willful or intentional wrong or gross negligence or reckless negligence as equivalent to such a wrong.

In a case decided by the Supreme Court of Mississippi in 1975, where punitive damages were awarded in the trial court, the Supreme Court said:

> "Punitive damages are not recoverable for the breach of a contract unless such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort. (Cases cited)." *Progressive Casualty Insurance Co. v. Keys,* (Miss.) 317 So. 2d 396.

In the above case, the trial court was reversed as to punitive damages. Another Mississippi case where the trial court was reversed as to punitive damages is that of *Lincoln Nat. Life Ins. Co. v. Crews,* 341 So. 2d 1321. See also the Mississippi case of *New Hampshire Ins. Co. v. Smith,* 357 So. 2d 119.

> "Lastly, Griffin cross appeals, contending that punitive damages and attorney's fees were appropriate remedies. It is settled that punitive damages are recoverable only where the breach is attended by some intentional wrong, insult, abuse or gross negligence which amounts to an independent tort (Cases cited). We are of the opinion the negligence of Bellefonte in failing to investigative thoroughly Griffin's claim of a more recent overhaul of the truck and in claiming depreciation were not such acts as to warrant punitive damages." *Bellefonte Ins. Co. v. Griffin,* (Miss.) 358 So. 2d 387, 391.

Under the applicable Mississippi law which here controls, Judge Cox had no election but to eliminate the punitive damages action from the lawsuit. This he did by sustaining a motion for judgment thereasto; and the judges on appeal have erroneously reversed the case thereasto and therein lies one of the principal complaints sought to

be presented to the Court through this petition, and which we sought to present in our en banc petition which was not heard. We have full belief that under no circumstances under the facts here involved could punitive damages be allowed or could a question of fact exist thereasto.

On July 9, 1980, the United States Court of Appeals for the Fifth Circuit reached a conclusion which should be controlling here and that is the case of *Marcum v. United States of America,* Cause Number 78-2248, and the opinion in that case has not yet been reported, but the slip sheet has same therein contained and we have copy thereof attached hereto for reference as Appendix 8 (A33); and in the third syllabus thereof the following words appear:

> "Where evidence viewed by Court of Appeals from same vantage point as trial court leaves the Court with a definite and firm conviction that a mistake has been committed, there is clear error and the Court is bound to set aside trial court's findings."

The same vantage point does not here exist because United States Judge Cox heard every witness testify. He had before him the suggested instructions of the parties on both sides and he was fully advised in the premises from actually viewing witnesses and determining for himself that there was not sufficient proof to submit to the jury the issue of punitive damages. The panel of judges of the Fifth Circuit only had the printed page and they did not have the same vantage point as did Judge Cox and the panel of judges on appeal did not have the same opportunity to review that before the trial court. In the Fifth Circuit case to which we above refer, there was the same vantage point for the trial judge and for the panel of judges because the matter was heard below, and that is in the trial court, through depositions and it was a matter of reading the record by the trial court and on appeal; and such is

not so here because there was much of oral testimony, as the record here discloses, and United States Judge Cox had opportunity to see and observe and hear the testimony of the witnesses and the effort of all in interest on the side of United States Fidelity and Guaranty Company to show that United States Fidelity and Guaranty Company did, in fact, act in good faith at all times and follow legal advice in the handling of the controversy from the beginning to the end; and the trial judge thus had no election but to recognize that the facts submitted through the testimony were insufficient for the punitive damages feature of the lawsuit to be submitted to the jury; and thus there was no basis for the decision breached by the court on appeal contrary to the conclusion reached by the trial judge. In the *Marcum* case, the Fifth Circuit had the following further to state:

> "However, where the evidence before the trial court consisted solely of depositions and other written matter, the court hearing no live witnesses, the burden of showing clear error is not so heavy as in the case where the court has the opportunity to assess the credibility of witnesses by personal observation (cases cited). Thus, where our view of the same evidence from the same vantage point as the trial court leaves us 'with a definite and firm conviction that a mistake has been committed,' there is a clear error and we are bound to set aside the court's findings." *Marcum v. United States of America*, supra.

CONCLUSION

Insurance contract No. C 205187 issued by Ross-King-Walker on the new 1972 GMC truck covered the accident of November 23, 1971, and all liability thereunder was paid and satisfied. The original pleading of respondents hereto was filed May 10, 1976 (R. 1). Answer of the petitioner here was filed June 1, 1976 (R. 31). The question was raised as to whether or not United States Fidelity and Guaranty Company had any exposure identified with the accident other than under contract No. C 205187, partially because plaintiffs recognized that contract No. C 3111037 was in no way involved (Appendix 9, A47). Again respondents hereto recognized notice of nonrenewal of policy No. C 3111037 with statement that said policy was "in no way connected with the coverage claimed and coverage herein involved." Substitution was with policy No. 2CC 637846 which was a premises coverage. The first amended pleading also eliminated contract No. C 3111037 as not connected with the coverage claimed and coverage involved. The question arises as to whether or not the respondents hereto are bound by their original and amended pleading which states that contract No. C 3111037 was in no way involved in the action. Respondent Henderson did not know and could not advise the local agent Sigler to which policy he wanted the newly acquired 1972 GMC truck to apply. Ragged pleadings preclude recovery above the $15,328.80 paid. In addition thereto, on question of punitive damages, the trial judge heard all of the witnesses and saw their demeanor on the witness stand and became familiar with the pleadings, and in considering the motion for directed judgment at the end of plaintiffs' testimony the court seriously considered peremptory instruction under the authority of *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.*, supra, and when the court over-

ruled the motion for directed verdict as to the principal case, the court did withdraw the punitive damage case and the case was not submitted to the jury as to the punitive damages issue but only as to the substituted coverage to which reference is made. We believe and contend that the trial judge had no election but to sustain motion against the plaintiffs on the punitive damages issue. Finally, the attorneys for United States Fidelity and Guaranty Company seek judgment as a matter of law since it paid the $15,328.80 under contract No. C 205187; but if mistaken in this and the Court must affirm the trial court, which we contend it should not, the trial court should at least be followed as against claim for punitive damages; and this is in the nature of the relief sought in this application or petition for writ of certiorari.

Respectfully submitted,

M. M. ROBERTS
(Counsel of Record)
ROBERTS & EASTERLING
Post Office Box 870
Hattiesburg, Mississippi 39401
(601) 583-3522
Attorney for Petitioner

CERTIFICATE

True copies of the foregoing petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed, postage prepaid, to Hon. Guy M. Walker, Post Office Box 41, Laurel, Mississippi 39440; Hon. J. C. Martin, Jr., Post Office Box 191, Waynesboro, Mississippi 39367; and Hon. Horton Hillman, Post Office Box 555, Leakesville, Mississippi 39451, Attorneys for Respondents, on this 12th day of September, A. D. 1980.

M. M. ROBERTS
Attorney for Petitioner

APPENDIX

APPENDIX 1

IN THE
CIRCUIT COURT OF GREENE COUNTY, MISSISSIPPI
NUMBER 2241

MRS. ELIZABETH RILES STEVISON,
ADMINISTRATRIX OF THE ESTATE
OF GRADY H. STEVISON, DECEASED
PLAINTIFF

VERSUS

H. H. HENDERSON AND DWAINE LEE HENDERSON
DEFENDANTS

ORDER

(Filed June 17, 1976)

THIS CAUSE coming on for hearing on tender of United States Fidelity and Guaranty Company of the sum of $15,328.80 made on May 3, 1976, to the Circuit Clerk of Greene County, Mississippi, with notice to H. H. Henderson, Dwaine Lee Henderson, and Horton Hillman, Esquire, their attorney, and to Mrs. Elizabeth Riles Stevison, administratrix of the estate of Grady H. Stevison, deceased, and to Guy Walker, Esquire, and to J. C. Martin, Esquire, attorneys for said administratrix, and on "Answer to Tender with Notice and Petition for Disbursement" filed by H. H. Henderson and Dwaine Lee Henderson by Horton Hillman, Esquire, their attorney, and Mrs. Elizabeth Riles Stevison, administratrix of the estate of Grady H. Stevison, deceased, by Guy M. Walker, Esquire, and J. C. Martin, Esquire, and on "Reply to 'Answer to Tender with Notice and Pe-

tition for Disbursement' " filed for United States Fidelity and Guaranty Company by M. M. Roberts, attorney for United States Fidelity and Guaranty Company with certificate thereto of May 28, 1976, and on agreement of all parties in interest that the $15,328.80 is the total liability and obligation of United States Fidelity and Guaranty Company under insurance contract No. C 205187 issued by Ross-King-Walker, Inc., agent of United States Fidelity and Guaranty Company, to H. H. Henderson, otherwise identified as Henry Hosey Henderson, on the motor vehicle identified with the accident of November 23, 1971, all court costs having been paid, and the $15,328.80 covers the principal, penalty and interest aforesaid under said insurance contract in application towards satisfaction of $100,000 judgment entered in this court on June 12, 1974, and from which an appeal was taken to the Supreme Court of Mississippi to result in affirmance of the judgment entered in the trial court by the Supreme Court of Mississippi in cause number 48,529 in said court; and there has been made claim by H. H. Henderson, Dwaine Lee Henderson and Elizabeth Riles Stevison, administratrix of the estate of Grady H. Stevison, deceased, that there exists further applicable insurance obtained through James B. Sigler, d/b/a Sigler Insurance Agency of Waynesboro, Mississippi, under public liability policy number 2CC 512726, it being claimed by said parties that this public liability policy was renewed or extended through policy number 2CC 637846 and United States Fidelity and Guaranty Company has denied the existence of said insurance as of the day and date of the accident aforesaid or the application thereof to the aforementioned motor vehicle accident; and thus a dispute has arisen thereasto, and because thereof an independent action has been filed in the United States District Court for the Hattiesburg Division of the Southern District of Mississippi, styled H. H. Hen-

derson, Dwaine Lee Henderson and Elizabeth Riles Stevison, Administratrix of the Estate of Grady H. Stevison, Deceased, vs. United States Fidelity and Guaranty Company, bearing civil action number H76-51(C) and the parties in interest are at issue in that action with answer having been filed for the defendant United States Fidelity and Guaranty Company; and the tender aforesaid is being accepted to cover the liability of United States Fidelity and Guaranty Company as to said policy number C 205187, being a 10/20/10 policy as to coverage on the specific motor vehicle identified in the accident; but all other issues will remain in full force and effect as same appear in said United States District Court action with no further need of this Court having or retaining jurisdiction over the controversy existing in said Federal Court action and with no further jurisdiction in this cause over any of the parties in this cause.

IT IS THEREUPON, the judgment of the Court and ORDERED that the Clerk of the Circuit Court of Greene County, Mississippi, pay to Elizabeth Riles Stevison, administratrix of the estate of Grady H. Stevison, deceased, the amount now held by said clerk in the sum of $15,328.80 which is in full settlement of all claims which said parties or either of them may have under said motor vehicle liability policy number C 205187, and any and all claims identified with said insurance contract number C 205187 issued by United States Fidelity and Guaranty Company to said H. H. Henderson on the motor vehicle involved in the accident aforesaid are canceled and held for naught but whatever rights, if any, H. H. Henderson and Dwaine Lee Henderson and Elizabeth Riles Stevison, administratrix of the estate of Grady H. Stevison, deceased, as plaintiffs in the aforementioned Federal Court action may have against United States Fidelity and Guaranty Company shall

remain in them and in which said Federal Court these issues will be resolved, except for that here terminated; and this Court retains no further jurisdiction over the action.

SO ORDERED on this 17th day of June, A. D., 1976.

s/ Merl F. Palmer
Circuit Judge

APPROVED AND
AGREED TO:

s/ M. M. Roberts
Attorney for United States Fidelity and Guaranty Company

s/ Horton Hillman
Attorney for H. H. Henderson and Dwaine Lee Henderson

s/ Guy M. Walker
s/ J. C. Martin
Attorneys for Elizabeth Riles Stevison, administratrix of the estate of Grady H. Stevison, deceased

APPENDIX 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NO. H76-51(C)

H. H. HENDERSON, DWAINE LEE HENDERSON, AND ELIZIBETH RILES STEVISON, ADMINISTRATRIX OF THE ESTATE OF GRADY H. STEVISON, DECEASED
PLAINTIFFS

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY
DEFENDANT

ORDER

(Filed July 21, 1976)

THIS CAUSE coming on for hearing on motion of the plaintiffs for authority to file amended complaint, the need therefor having arisen by virtue of final disposition and termination of all claims against United States Fidelity and Guaranty Company under its insurance contract number C 205187 issued by Ross-King-Walker, Inc., of Hattiesburg, Mississippi, agent for said company, covering motor vehicle in the accident identified in Exhibit "A" to the motion here acted upon with agreement hereto by attorney for the defendant United States Fidelity and Guaranty Company that amended complaint be filed to eliminate issues heretofore disposed of and the parties agreeing hereto:

IT IS, THEREUPON, the judgment of the Court and ORDERED that the plaintiffs in the above styled and numbered cause be and they are hereby authorized and em-

powered to file amended complaint in lieu of the "Declaration" heretofore filed in this cause as of May 10, 1976, and that the defendant be granted twenty (20) days from the date of the filing of the amended complaint within which to file answer thereto, with discovery to begin after the answer to the amended complaint has been filed.

SO ORDERED on this 19 day of July, A.D., 1976.

s/ Harold Cox
United States District Judge

APPROVED AND
AGREED TO:

s/ Horton Hillman
Attorney for H. H. Henderson and
Dwaine Lee Henderson

s/ M. M. Roberts
Of Attorneys for Defendants

s/ Guy M. Walker
s/ J. C. Martin
Attorneys for Elizabeth Riles
Stevison Administratrix of the Estate

APPENDIX 3

UNITED STATES FIDELITY AND GUARANTY COMPANY

Baltimore, Maryland

DECLARATIONS

Item 1.

NAMED INSURED Address (No. & Street, City, County, State)	HENRY HOSEY HENDERSON RFD #1 Richton, Mississippi	Branch Office and Agent or Broker MDN. Cirler Ins. Agency 9/9-1-70
Business of Named Insured Logging	Policy Number 2CC 637846 — Item 2 Policy Period From 11-10-70 To 11-10-71 The Named Insured is: ☒ Individual ☐ Partnership ☐ Corporation ☐ Joint Venture ☐ Other (specify)	12:01 A.M. standard time at the address of the Named Insured as stated herein Renews 2CC 512726 — Co. 1 — B.B. 44 — Agency 7305

Item 3 The insurance afforded is only with respect to such of the following Coverage Parts and Coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such Coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

COVERAGE PARTS	COVERAGES	LIMITS OF LIABILITY	ADVANCE PREMIUMS
Owners', Landlords' and Tenants' Liability Insurance	A Bodily Injury Liability	$ .000 each person $ .000 each occurrence	$ .0
	B Property Damage Liability	$ .000 each occurrence $ .000 aggregate	$ .00
Manufacturers' and Contractors' Liability Insurance	A Bodily Injury Liability	$ 50 .000 each person $ 100 .000 each occurrence	$ 27 .00
	B Property Damage Liability	$ 25 .000 each occurrence $ 25 .000 aggregate	$ 72 .00
Medical Payments Insurance	C Premises Medical Payments	$ each person $ .000 each accident	$ .00
Completed Operations and Products Liability Insurance	A Bodily Injury Liability	$ .000 each person $ .000 each occurrence $ .000 aggregate	$ .00
	B Property Damage Liability	$ .000 each occurrence $ .000 aggregate	$ .00
Contractual Liability Insurance	Y Contractual Bodily Injury Liability	$ .000 each person $ .000 each occurrence	$ .00
	Z Contractual Property Damage Liability	$ .000 each occurrence $ .000 aggregate	$ .00
Insurance Against Uninsured Motorists	U Uninsured Motorists	$ .000 each person $ .000 each accident	$ .00
	See Coverage Parts for Coverages and Limits of Liability		$ .00
			$ .00
			$ .00
			$ .00
Endorsement Nos. (other than those entered on Coverage Parts) Cas. 95			$ .00
Audit Period: Annual, unless otherwise designated below ☐ Semi-annually ☐ Quarterly ☐ Monthly		Total Advance Premium	$ 99 .00

If the policy period is more than one year and the premium is to be paid in installments, premium installments are payable as follows:
Effective Date $ .00 ; 1st Anniversary $ .00 ; 2nd Anniversary $ .00

Countersigned by _____
Authorized Representative

Casualty 7 (10-67) 1970 Coding

APPENDIX 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NO. H76-51(C)

H. H. HENDERSON, DWAINE LEE HENDERSON, AND ELIZABETH RILES STEVISON, ADMINISTRATRIX OF THE ESTATE OF GRADY H. STEVISON, DECEASED
PLAINTIFFS

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY
DEFENDANT

ORDER

(Filed August 15, 1977)

THIS CAUSE coming on for hearing on motion for continuance and authority to substitute policy number C3111037 for policy number 2CC 512726 and with said motion the Court also heard motion filed for defendant for summary judgment, and the Court is of the opinion that the case of the plaintiffs against United States Fidelity and Guaranty Company should be dismissed with prejudice as to its policy bearing number 2CC 512726 and other policies of insurance identified in the complaint and as to those contracts only this cause is dismissed with prejudice, but the plaintiffs may name another insurance contract in additional pleading authorized herewith.

IT IS, THEREUPON, the judgment of the Court and ordered that the claim of the plaintiffs against the defen-

dant as to insurance contracts identified in the complaint bearing policy numbers 2CC 512726 and 2CC 637846 and the claims asserted in the complaint in the identified insurance contracts are dismissed with prejudice with the plaintiffs not entitled to recover thereunder; but the plaintiffs may file in this same pending action claim they desire to assert pursuant to their motion therefor as related to insurance contract number C3111037.

SO ORDERED AND ADJUDGED on this 15 day of August, A.D., 1977.

s/ Harold Cox
United States District Judge

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NUMBER H76-51(C)

H. H. HENDERSON, DWAINE LEE HENDERSON, AND ELIZABETH RILES STEVISON, ADMINISTRATRIX OF THE ESTATE OF GRADY H. STEVISON, DECEASED
PLAINTIFFS

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY
DEFENDANT

FINAL JUDGMENT

(Filed June 27, 1978)

THIS CAUSE having come on for trial on June 22 and June 23, 1978, and there having come the plaintiffs in their proper persons and by and through their attorneys, and there having come the defendant by and through its attorneys, and issue having been joined, and all parties having announced ready for trial, and having come also John F. Heath and eleven and other good and lawful citizens of the Southern District of Mississippi, Hattiesburg Division, who having been properly impanelled as a jury to hear and decide the issues involved herein, and being properly sworn and impanelled according to law, and the plaintiffs, having introduced sworn testimony and other evidence and having rested, and after the jury having heard and considered all the evidence offered by the plaintiffs and by the defendant, and after receiving proper instructions from

the Court, the jury presently retired and after due deliberation having returned into open Court, delivered a unanimous verdict, as follows:

"We, the jury, find for the plaintiffs and assess their damages at $50,000.00."

And the Court, having considered the verdict of the jury and the evidence and being of the opinion that the verdict should be reduced and a remittitur rendered for the amount of the premium due on policy number C 3111037 in the amount of $293.00, the evidence being uncontradicted that said premium was never paid, and the Court finding that the defendant, United States Fidelity and Guaranty Company, is entitled to collect said premium;

IT IS THEREFORE, ORDERED AND ADJUDGED that the plaintiffs have and recover of the defendant, United States Fidelity and Guaranty Company, the sum of $50,000.00, less $293.00 due on the premium, for a judgment in the sum of $49,707.00 with interest at rate as provided by law and all costs of this action.

SO ORDERED AND ADJUDGED on this 27 day of June, A. D., 1978.

s/ Harold Cox
United States District Judge

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NUMBER H76-51(C)

H. H. HENDERSON, DWAINE LEE HENDERSON, AND ELIZABETH RILES STEVISON, ADMINISTRATRIX OF THE ESTATE OF GRADY H. STEVISON, DECEASED
PLAINTIFFS

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY
DEFENDANT

AMENDMENT TO MOTION FOR NEW TRIAL OR CORRECTED JUDGMENT

(Filed June 27, 1978)

Comes the defendant, United States Fidelity and Guaranty Company, and adopts all of that contained in its motion for new trial or corrected judgment with certificate thereto of June 24, 1978, and which motion was filed with the clerk of the court, where the cause has been pending, on June 26, 1978, and makes the same as much a part hereof as if again copied herein and further says that the original motion filed on June 26, 1978, was filed before judgment for $50,000.00 pursuant to jury verdict was entered; and which judgment is being entered on the day and date of the filing of this amended motion, and for amendment to the aforementioned motion, we add thereto paragraph XVII as follows, to-wit:

XVII

That the undisputed testimony in this record discloses that H. H. Henderson never requested of Sigler Insurance Agency or the United States Fidelity and Guaranty Company that contract number C 3111037 have identified therein and substituted a 1972 GMC motor vehicle, bearing serial number V 504642, already covered by insurance contract number C 205187; and no mention was ever made of this desire of substitution of motor vehicles within the 30 day period within which a new or additional or other motor vehicle may be substituted for the motor vehicle specifically identified in the C 3111037 contract; and there is no evidence in the record to disclose that either H. H. Henderson or any other person for him sought to substitute the 1972 GMC motor vehicle in the existing contract number C 3111037; but if there had been attempt thereat, such would be void with no authority therefor; and under no circumstances would Sigler Insurance Agency be able to make substitution of the 1972 GMC motor vehicle for the 1971 Chevrolet motor vehicle.

WHEREFORE, defendant prays that judgment be entered for it for reasons hereinabove set forth and set forth through motion filed on June 26, 1978, including the prayer thereto.

s/ M. M. Roberts
Of Attorneys for Defendant

Roberts & Easterling
Post Office Box 870
Hattiesburg, Mississippi 39401
(601) 583-3522

NOTICE OF HEARING WITH CERTIFICATE

The foregoing amendment to motion will be called up for hearing before the court at the United States District Court in Hattiesburg, Mississippi, on June 27, 1978, at 2:00 p.m. or as soon thereafter as counsel may be heard by the court; and in support of the foregoing amendment to motion, the arguments which have already been submitted to the Court constitute a part and parcel of that before the Court for determination; and a copy of the foregoing amendment to motion has been delivered to Guy Walker, one of the attorneys for the plaintiffs, at the time of the filing of this amendment to motion, and copies thereof are being mailed to the Honorable J. C. Martin, Jr., Post Office Box 191, Waynesboro, Mississippi, 39367, and to the Honorable Horton Hillman, Post Office Box 555, Leakesville, Mississippi, 39451, attorneys for the plaintiffs, on this 27th day of June, A. D., 1978.

s/ M. M. Roberts
Of Attorneys for Defendant

APPENDIX 6-A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

CIVIL ACTION NUMBER H76-51(C)

H. H. HENDERSON, DWAINE LEE HENDERSON, AND ELIZABETH RILES STEVISON, ADMINISTRATRIX OF THE ESTATE OF GRADY H. STEVISON, DECEASED, PLAINTIFFS

VERSUS

UNITED STATES FIDELITY AND GUARANTY COMPANY
DEFENDANT

ORDER OVERRULING MOTION FOR NEW TRIAL OR CORRECTED JUDGMENT

(Filed June 27, 1978)

THIS CAUSE coming on for hearing on motion for new trial or corrected judgment filed for and on behalf of the defendant, United States Fidelity and Guaranty Company, and the Court having heard and considered same is of the opinion that the motion is not well taken and in all respects should be overruled.

IT IS, THEREUPON, the judgment of the Court and ordered that the motion for new trial or corrected judgment in the above styled and numbered cause be and it is hereby overruled and the relief therein sought is denied.

SO ORDERED on this 27th day of June, A. D., 1978.

s/ Harold Cox
United States District Judge

APPENDIX 7

H. H. HENDERSON, Dwaine Lee Henderson et al.,
Plaintiffs-Appellees Cross-Appellants,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant-Appellant Cross-Appellee.

No. 78-2528.

United States Court of Appeals,
Fifth Circuit.

July 3, 1980.

Insured brought action against insurer for coverage under vehicle liability policy and for punitive damages. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., entered judgment finding coverage and insurer appealed and insured cross-appealed from denial of its punitive damages claim. The Court of Appeals, Fay, Circuit Judge, held that: (1) evidence sustained jury's finding that notice of nonrenewal of vehicle liability policy was not given to insured until after fatal accident for which claim was made under the policy; (2) sufficient evidence existed to support jury's finding that insurer had notice of insured's replacement of vehicle insured under the vehicle liability policy; and (3) there was sufficient evidence that insurer withheld vehicle liability policy in face of insured's request for copies of all his policies to submit punitive damages issue to jury.

Affirmed in part, reversed in part, and remanded.

1. Federal Courts (Key) 817

Appellate review of trial court's grant of leave to amend a pleading is restricted to determining whether the

trial court abused its discretion. Red.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

2. Federal Civil Procedure (Key) 828

District court can consider many factors in exercising its discretion to grant leave to amend a pleading such as undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party by virtue of allowance of the amendment, and futility of amendment; court can also examine whether undue prejudice to the movant will result from denying leave to amend. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

3. Federal Civil Procedure (Key) 840

In action by insured against insurer for coverage under vehicle liability policy, district court did not abuse its discretion in allowing insured to amend his complaint several months after the action was filed to allege the proper policy, since such amendment did not inhibit insurer's ability to defend and the reasons for insured's delay in amending made clear his good faith and the unfair prejudice that would have resulted from a denial of the amendment. Fed.Rules Civ.Proc. Rule 15(a), 28 U.S.C.A.

4. Insurance (Key) 145.1, 235

When a post-office certificate of mailing is not submitted, jury is not required to believe that notice of nonrenewal or cancellation of policy was sent or received. Code Miss.1972, § 83-11-9.

5. Insurance (Key) 235

Evidence sustained jury's finding that notice of nonrenewal of vehicle liability policy was not given to insured until after fatal accident for which claim was made under the policy.

6. Insurance (Key) 437.1(4)

Sufficient evidence existed to support jury's finding that insurer had notice of insured's replacement of vehicle insured under vehicle liability policy.

7. Insurance (Key) 145.2, 235

In action by insured against insurer for coverage under vehicle liability policy, district court properly allowed jury to decide issues as to when notice of nonrenewal of the policy was given to insured and as to whether insurer had notice of insured's replacement of the vehicle insured under the policy.

8. Insurance (Key) 435.3(1)

Where 1972 truck was bought after the issuance of vehicle liability policy, while the policy was effective, to replace 1971 truck, which was incapable of further service, 1972 truck was a replacement vehicle.

9. Insurance (Key) 186(3), 310(2)

Argument that vehicle liability policy was ineffective because premium was not paid failed, where jury could have found that insured had a billing and credit arrangement with his agent making nonpayment irrelevant and no notice of cancellation of the policy for nonpayment of premium had been given. Code Miss.1972, § 83-11-5.

10. Damages (Key) 89(2)

Under Mississippi law, punitive damages can, within limits, be assessed for breach of contract.

11. Damages (Key) 91(3)

Act giving rise to punitive damages must be a willful and intentional wrong, or such gross negligence and reckless negligence as is equivalent to such a wrong.

12. Insurance (Key) 514.3, 602.2(3)

Punitive damages are denied when insurance company defends, rather than settles, a close case; when it honestly contests the amount of damage; when it contests coverage and effectively cannot recover reimbursement from the insured if it settles with the injured party and is later held not liable under the policy; and when it contests coverage because the insured has failed to meet a policy condition.

13. Insurance (Key) 602.2(1)

Punitive damages will not be awarded if insurer has a legitimate or arguable reason for not paying claim.

14. Insurance (Key) 602.12(2)

In action by insured against insurer for coverage under vehicle liability policy, there was sufficient evidence that insurer withheld policy in face of insured's request for copies of all his policies to submit issue of punitive damages to jury.

15. Insurer (Key) 602.2(3)

Insurer's alleged acts in hiding vehicle liability policy in the face of insured's requests for copies of all his policies would render ineffectual any other defense insurer had to insured's punitive damages claim in his action against insurer for coverage under the vehicle liability policy.

Appeals from United States District Court for the Southern District of Mississippi.

Before WISDOM, FAY and TATE, Circuit Judges.

FAY, Circuit Judge:

An insured brought this diversity action against its insurance carrier for additional coverage and punitive damages under Mississippi law. Both sides appeal from

district court rulings and a jury verdict for plaintiffs.[1] The insurance company, United States Fidelity and Guaranty Company (USF&G), contests the sufficiency of evidence of coverage, and the filing of two amended complaints. Plaintiffs cross-appeal, challenging the district court's denial of their punitive damages claim. Finding that the coverage question was one for the jury, we affirm the verdict, which was supported by substantial evidence. The decisions to allow amendments to the complaint are affirmed since no abuse of discretion is shown. We reverse, however, the denial of the punitive damages claim, because sufficient evidence existed to submit the issue to the jury.

I. *Background For This Suit*

Plaintiff Henry Henderson owns a logging and lumberyard business in Mississippi. He owns many contracts of insurance on his property, and evidently does not possess copies of them all.

On November 7, 1969, Henderson purchased from USF&G's agent Sigler a liability insurance policy, number C3111037, with $50,000 coverage on a 1969 truck and trailer. Henderson habitually buys his liability coverage from Sigler. Henderson claims he never received a copy of the C3111037 policy. In 1970, Sigler billed Henderson for the renewal premium. It was paid approximately two weeks after the November 7 renewal date. The policy covers replacement vehicles if notice of the replacement is given to the insurance company within thirty days of purchase. Henderson replaced his 1969 truck with a 1971 Chevrolet truck. C3111037 was modified to cover the

1. Joined as plaintiffs in this action are an employee of the insured, who drove a truck which caused the death of Grady L. Stevison, and Stevison's administratrix.

1971 replacement, which pulled the same trailer as the 1969 truck.

On November 2, 1971, one of Henderson's employees turned the 1971 truck over in the woods, wrecking it beyond repair. On November 10, Henderson purchased a 1972 GMC truck to replace the 1971 truck and to pull the same trailer. That same day, Henderson purchased another USF&G policy from the Ross-King-Walker agency, as he was required to do by the GMC loan financer. Henderson testified that he ordered only property collision insurance because he knew he had liability coverage through Sigler. The Ross agency, however, actually wrote a policy which gave Henderson $10,000 in liability coverage in addition to the collision coverage. Approximately two weeks after the wreck of the 1971 truck, Henderson sold it as junk.

On November 23, 1971, the new 1972 truck which was connected to the old trailer stalled while making a U-turn, causing Grady Stevison's vehicle to collide with the truck, and costing Stevison his life. The next day, Henderson claims he informed Sigler of the new 1972 replacement vehicle and the fatal accident. He says Sigler assured him he was covered. Sigler denies that this conversation occurred. Henderson states that on November 27, he received from USF&G a notice that C3111037 would not be renewed. The notice did not identify the property covered by C3111037, and since Henderson did not have a copy of the policy, he did not know which one the company was not renewing. The notice from USF&G was dated October 7, 1971, although at trial, no certificate of mailing was produced. Under Mississippi law, a nonrenewal is ineffective without thirty days' notice.[2]

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2. *See* note 3 *infra.*

Stevison's administratrix commenced a state court action in Greene County against Henderson and his truck driver. She offered to settle for $40,000. Henderson, confident that he had $50,000 liability coverage, conveyed the offer to USF&G. USF&G claimed that its only liability was for $10,000, informing Henderson for the first time of the Ross agency's liability policy on the 1972 truck. When USF&G refused to settle, Henderson brought a separate state court action in Wayne County attempting to uncover the $50,000 policy and to settle USF&G's liability under it. He sued under the only $50,000 policy of which he had a copy, but it was not the right one. When discovery efforts failed to produce the $50,000 vehicle liability policy, the Wayne County suit was dismissed without prejudice.

In the *Stevison* trial, the administratrix was granted a directed verdict on liability. The jury awarded $100,000 damages; with six-percent postjudgment interest. After appeal to the Supreme Court of Mississippi, USF&G tendered to the court $10,000 plus a five-percent penalty for appeal, plus interest. Henderson, the employee-driver, and Stevison's administratrix refused to release USF&G from further liability, claiming that a $50,000 policy existed. This action followed in federal district court, in which the plaintiffs claim that USF&G is liable under a $50,000 policy and is subject to punitive damages for wrongful denial of coverage and failure to settle the *Stevison* lawsuit.

As in the Wayne County suit, Henderson originally filed this action under the wrong policy. Not until Sigler's files were produced at his deposition were the records of C3111037 supplied to Henderson. The complaint was then amended to allege the correct policy number.

II. *The Parties' Theories*

Henderson asserts that he was covered under the $50,000 policy, C3111037, even though the renewal date has passed without his tendering the renewal premium. Mississippi law provides that an insurer cannot refuse to renew a policy unless it gives thirty days' advance notice. Miss.Code § 83-11-7 (1972).[3] Henderson argues that he did not receive notice of nonrenewal until after the accident; therefore, the policy had not lapsed. His failure to pay the renewal premium does not invalidate the policy because he had established a billing and credit relationship with Sigler and because Mississippi law allows cancellation for nonpayment only after ten days' notice. Miss.Code § 83-11-5 (1972). Not only was the policy effective, but it also covered the 1972 GMC truck because, as provided in the policy, Henderson gave Sigler notice that the 1972 truck was a replacement vehicle within thirty days of its purchase. Henderson reasons, therefore, that USF&G is liable under C3111037 and that the jury verdict should be affirmed as modified.[4]

Henderson's correlative theory is that USF&G is liable for punitive damages for failing to settle the *Stevison* case and for denying coverage. Throughout the *Stevison* trial and the Wayne County suit, Henderson asserted that a $50,000 vehicle liability policy existed. Despite Henderson's claims and discovery attempts, USF&G withheld C3111037. Henderson argues that sufficient evidence

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3. The statute reads in part as follows:

> No insurer shall fail to renew a policy unless it shall mail or deliver to the name insured, at the address shown in the policy, at least thirty (30) days' advance notice of its intention not to renew.

Miss.Code § 83-11-7 (1972).

4. The trial court reduced the verdict by $293, the amount of the unpaid premium.

exists for granting punitive damages under Mississippi law, and that the trial court's refusal to present this issue to the jury is reversible error.

USF&G contends that Henderson's theory of coverage is one dreamed up long after the events now in question. USF&G's position is that notice of non-renewal was given on October 7, 1971, and that the policy therefore expired on November 7, before the fatal accident. Furthermore, it argues that the 1972 GMC truck cannot be a replacement because it does not meet the definition of a replacement vehicle and because USF&G did not receive notice of the replacement until this litigation. It also contends that the policy cannot be in force because the premium was never paid.

Besides contesting Henderson's factual allegations, USF&G asserts that Henderson could not have two policies on the same vehicle in effect at once and that he should not have been allowed to amend the complaint to cover C3111037 after Sigler's deposition. USF&G argues that the jury verdict should therefore be reversed.

III. *Amendment Was Proper*

USF&G contests the trial court's allowance of an amendment to the complaint which brought C3111037, the $50,000 policy, into issue. This action was filed on May 10, 1976. On August 5, 1976, an amended complaint was filed to reflect USF&G's tender into state court of the $15,328.80 owed after appeal under the $10,000 policy. Two days after Sigler's deposition, Henderson moved to amend the complaint to change the policy number upon which this action was based from a premises liability policy to the $50,000 vehicle liability policy. The court granted the motion and the second amended complaint was filed September 22, 1977, nine months before trial. Without citation to

authority, USF&G argues that the trial court "had no right or authority" at that late date to permit another amended pleading involving a different insurance contract.

[1, 2] The trial court's authority to permit amendment is found in Fed.R.Civ.P. 15(a). That rule provides that amendment will be "freely [granted] when justice so requires." Appellate review is restricted to determining whether the trial court abused its discretion in granting leave to amend. *Harkless v. Sweeny Independent School District*, 554 F.2d 1353, 1359 (5th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 452 (1977). The district court can consider many factors in exercising its discretion, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment. . . ." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). The court also can examine whether undue prejudice to the movant will result from denying leave to amend. *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69, 75-77 (5th Cir. 1961).

[3] USF&G does not advance a convincing case of prejudice; it does not argue that the amendment or delay inhibited its ability to defend. The reasons for delay in amending make clear Henderson's good faith and the unfair prejudice that would have resulted from a denial of the amendment. From the beginning, Henderson claimed that he had $50,000 of coverage, that he did not know in which policy the coverage was contained, that he did not have copies of all policies, and that he wanted copies from USF&G. Despite a separate state court suit, interrogatories, and requests for production USF&G did not produce the $50,000 policy until Sigler's deposition, which was taken

after the filing of the first amended complaint in this case. Within two days of the deposition, Henderson moved to amend the complaint. One purpose of the liberal policy embodied in rule 15(a) is to permit the addition of matters unknown at the time the complaint was filed.[5] Under these facts, the district court did not abuse its discretion in allowing Henderson to amend his complaint.[6]

IV. *The Policy Was In Effect*

Under the scenario advanced by USF&G, notice of nonrenewal of insurance was sent to Henderson October 7, the policy expired November 7, and the 1972 GMC truck was not covered by C3111037. The 1972 GMC was not a replacement and no authorized agent received notice of replacement. Only one policy, the $10,000 policy, covered the GMC truck, and the $50,000 C3111037 policy could not also cover it, especially since the premium was never paid.

The primary flaw in USF&G's position is that it relies upon resolution in USF&G's favor of factual issues that are within the jury's province. USF&G's remaining arguments are not supported by the law.

[4] Notice is usually a jury question in Mississippi. Notice of nonrenewal or cancellation can be proved by

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5. This policy does not rescue lawyers lacking diligence. *Layfield v. Bill Heard Chevrolet Co.*, 607 F.2d 1097, 1099 (5th Cir. 1979); *see Lamar v. American Finance System*, 577 F.2d 953, 955 (5th Cir. 1978). When serious effort, however, fails to uncover needed facts or theories until after the complaint's filing, amendment may, within the trial court's sound discretion, be proper.

6. USF&G also argued that because Henderson stated in his first two pleadings that C3111037 was not involved in this action, he should be estopped from changing his position. USF&G denied those allegations in Henderson's two pleadings, and shows no prejudice from Henderson's turn-around, which, according to Henderson, was due to USF&G's own failure to disclose materials on discovery.

production of a certificate of mailing, Miss.Code § 83-11-9 (1972),[7] but no such certificate was produced at this trial. In interpreting the language of insurance contracts, the Supreme Court of Mississippi has held that the agent's testimony that the letter was mailed and a post office certificate are adequate proof of notice. *See Transamerica Insurance Co. v. Bank of Mantee,* 241 So.2d 822, 824-25 (Miss. 1972) (on rehearing), *interpreting Employers Mutual Casualty Co. v. Nosser,* 250 Miss. 524, 164 So.2d 426 (1964). When a certificate is not submitted, however, the jury is not required to believe that notice was sent or received:

> The testimony of an insurance agent, like the testimony of any other witness, is to be weighed and evaluated by the trier of facts, taking into consideration other testimony and the surrounding circumstances in the case, and, if the surrounding circumstances are such as to outweigh the statement of an insurance agent that he mailed the required notice, the jury or trier of facts is not bound to accept the agent's statement simply because the agent so testified.

Transamerica Insurance Co. v. Bank of Mantee, 241 So.2d at 825.

[5] Evidence supports the jury's finding that notice was not given until after the fatal accident. Even before Henderson knew C3111037 was the correct policy, he asserted in his two prior complaints that he had received the nonrenewal notice for C3111037 on November 27. No employee of USF&G's main office testified that the notice was sent October 7. Sigler could not testify that his office

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7. This section reads as follows:

> Proof of mailing of notice of cancellation, or of intention not to renew, or of reasons for cancellation to the named insured by a certificate of mailing, at the address shown in the policy, shall be sufficient proof of notice.

Miss.Code § 83-11-9 (1972).

had received its copy of the notice shortly after October 7. Sigler did testify that it was his agency's practice to send its own notice of nonrenewal whenever it received a copy of such notice from USF&G's main office. Record, vol. III, at 27-28. No copies of a separate notice were in Sigler's file. The slender thread supporting USF&G's position is a copy of the USF&G notice, dated October 7, in Sigler's file. The jury was free to find that USF&G had not actually sent notice on that date, but had back-dated the notice and mailed it after learning of the accident.

[6, 7] Similarly, sufficient evidence exists to support a finding that USF&G had notice that the 1972 GMC had replaced the 1971 Chevrolet truck. Sigler had effected such a replacement in the past. He testified that he had authority to bind USF&G. Record, vol. III, at 29. Henderson testified that he gave notice of the replacement within thirty days, as the policy requires. The district court did not err in allowing the jury to decide these notice issues.

[8] Citing a Missouri case, USF&G argues that the 1972 truck does not meet the definition of a replacement vehicle. Even assuming that the case applies in Mississippi, it renders USF&G no aid because taking the facts as resolved by the jury, the 1972 truck meets all the requirements of the definition.[8]

[9] USF&G's argument that the policy was ineffective because the premium was not paid fails for two reasons.

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8. The case states that the vehicle must have been acquired after the policy's issuance, during the policy period, to replace the vehicle the policy describes, which was disposed of or incapable of further service. *Beck Motors, Inc. v. Federal Mutual Insurance Co.*, 443 S.W.2d 200, 203 (Mo.App.1969), *quoting, State Farm Mutual Automobile Insurance Co. v. Shaffer*, 250 N.C. 45, 108 S.E.2d 49 (1959). The 1972 truck was bought after issuance, while the policy was effective, to replace the 1971 truck, which was incapable of further service. Therefore the 1972 truck was a replacement vehicle.

First, the argument may rest on factual assumptions decided by the jury adversely to USF&G. The jury could have found that Sigler had a billing and credit arrangement with Henderson which made the nonpayment irrelevant. Second, Mississippi law requires ten days notice before a policy can be cancelled for nonpayment of the premium. Miss. Code § 83-11-5 (1972). No such notice was given.

USF&G cites neither case precedent nor a contract clause supporting its position that Henderson could not have had two policies on the same vehicle. When two different insurers cover the same property, the courts usually prorate the loss between them. *See* 8 J. Appleman, Insurance Law and Practice § 4913 (1962). USF&G advances no reason why two policies from the same insurer should be treated differently. Furthermore, Henderson asserts that the only reason he had two liability policies was because of error by USF&G's agents. USF&G's contention is meritless.

The jury verdict finding coverage under C 3111037 is affirmed.

V. *Punitive Damages: A Jury Question*

Henderson cross-appeals the district court's failure to submit the claim for punitive damages to the jury.[9] In denying the claim, the court relied upon a Mississippi case which held that an insurer's refusal to settle within policy limits in a contested case does not constitute either negligence or fraud. *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.*, 186 Miss. 747, 191 So. 415 (1939).

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9. At each stage of trial, Henderson raised the punitive damages claim; at each stage the district court ruled against him. Because we hold that the district court erred at each stage, we review the decision under the stiffest standard, that for a directed verdict or judgment n. o. v. *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

[10-13] Under Mississippi law, punitive damages can, within limits, be assessed for breach of contract. The act giving rise to punitive damages must be "a willful and intentional wrong, or . . such gross negligence and reckless negligence as is equivalent to such a wrong." *Seals v. St. Regis Paper Co.*, 236 So.2d 388, 392 (Miss.1970). Punitive damages are denied when the insurance company defends, rather than settles, a close case, *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.*, 186 Miss. 747, 191 So. 415 (1939); when it honestly contests the amount of damage, *Progressive Casualty Insurance Co. v. Keys*, 317 So.2d 396 (Miss. 1975); when it contests coverage and effectively cannot recover reimbursement from the insured if it settles with the injured party and is later held not liable under the policy, *Martin v. Travelers Indemnity Co.*, 450 F.2d 542 (5th Cir. 1971); and when it contests coverage because the insured has failed to meet a policy condition, *Lincoln National Life Insurance Co. v. Crews*, 341 So.2d 1321 (Miss.1977). Punitive damages will not be awarded if the insurer has a legitimate or arguable reason for not paying the claim. *See Standard Life Insurance Co. of Indiana v. Veal*, 354 So.2d 239, 248 (Miss.1978).

Punitive damages were allowed when an insurer used its superior bargaining position to delay in paying any part of separate claims, despite the insured's dire financial straits, because of an unwritten policy to pay the whole claim at once. *Travelers Indemnity Co. v. Wetherbee*, 368 So.2d 829 (Miss.1979). Punitive damages were also proper when the reason for denying payment was contrary to an express term in the policy. *Standard Life Insurance Co. of Indiana v. Veal*, 354 So.2d 239 (Miss.1978). The Supreme Court of Mississippi expressed the policy behind granting punitive damages in these cases:

> If an insurance company could not be subjected to punitive damages it could intentionally and unreason-

> ably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Id. at 248.

[14] Henderson claims that despite his continued assertion that he had a $50,000 policy with USF&G, and despite the separate suit brought and discovery attempted in Wayne County, USF&G hid the C3111037 policy. Because of USF&G's acts, Henderson could not settle with the administratrix for $40,000, and was exposed to a $100,000 liability. Henderson testified that he gave Sigler notice of the replacement. Record, vol. III, at 67. USF&G's investigator testified that USF&G had knowledge soon after the accident that Henderson was asserting that he had $50,000 of coverage, not $10,000. *Id.* at 136-37. The evidence could support a jury verdict that USF&G withheld the policy at the time of the suit over the accident in the face of Mr. Henderson's request for copies of all his policies. The directed verdict is therefore reversed. In light of the high standards to be met before punitive damages are assessed, a jury may well find that gross negligence, recklessness, fraud, or other intentional wrongs are not reflected in USF&G's conduct. Nevertheless, when the evidence is viewed in the light most favorable to Henderson, substantial evidence exists sufficient to overcome a motion for directed verdict. *Boeing Company v. Shipman,* 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

[15] This reversal is proper even though under Mississippi caselaw, USF&G had an arguable defense to cov-

erage, which ordinarily would be sufficient to immunize its actions from punitive sanctions. If Henderson's position is accepted, USF&G's acts in hiding the policy render ineffectual any other defense it had to the punitive damages claim. If USF&G had delivered the policy and asserted its coverage defenses, Henderson could have successfully brought a separate action to settle the insurance question, as he tried to do. If coverage had been established, as it was in the trial of this case, then serious settlement negotiations could have been undertaken with the administratrix, who was willing to settle within the $50,000 policy's limits. Henderson would not have been held liable for $100,000. Should a jury determine that USF&G's refusal to be forthright, until after stalwart efforts by Henderson, blocked this solution their other defenses to the punitive damages claim are rendered invalid.

CONCLUSION

The jury verdict, as amended by the district court, is AFFIRMED. The district court's decision to withhold the issue of punitive damages from the jury is REVERSED and REMANDED for trial.

APPENDIX 8

Virginia Elaine MARCUM,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 78-2248.

United States Court of Appeals,
Fifth Circuit.

July 9, 1980.

Widow of deceased pedestrian highway crew member brought action against the United States under the Federal Tort Claims Act alleging that decedent was killed in accident caused by negligence of motorist, an employee of the United States acting within the scope of his employment. The United States District Court for the Middle District of Louisiana, E. Gordon West, Senior Judge, approved judgment entered by magistrate in favor of the United States, and plaintiff appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) motorist, who was aware that there was some type of work in progress in intersection which he was approaching, who observed work truck and one of the pedestrian crew members, and who proceeded through intersection at speed of 35 miles per hour, was negligent under Louisiana law in striking clearly visible cable suspended approximately 18 inches above the road well before motorist entered the intersection and in causing accident which led to pedestrian crew member's death when his head struck curb as he was dragged behind motorist's automobile after motorist struck the cable, which then wrapped around pedestrian's legs, and (2) possibility that Department of

Highways may have been negligent in failing to use adequate cautionary signals or other safety devices did not bar motorist's liability.

Reversed and remanded.

1. United States (Key) 78(14)

In actions brought pursuant to the Federal Tort Claims Act, state law where the alleged negligence occurred is controlling. 28 U.S.C.A. §§ 1346(b), 2674.

2. Federal Courts (Key) 792, 850

With regard to Court of Appeals' view of trial court's factual determinations, clearly erroneous standard applies; however, where evidence before trial court consisted solely of depositions and other written matter, the court hearing no live witnesses, burden of showing clear error is not so heavy as in case where the court has opportunity to assess credibility of witnesses by personal observation.

3. Federal Courts (Key) 853

Where evidence viewed by Court of Appeals from same vantage point as trial court leaves the Court with a definite and firm conviction that a mistake had been committed, there is clear error and the Court is bound to set aside trial court's findings.

4. Automobiles (Key) 160(1)

For a pedestrian to recover against a motorist under Louisiana law, there must be fault on part of the motorist which brings about the injury.

5. Negligence (Key) 56(1.12), 134(11)

Under Louisiana's duty/risk analysis applicable in negligence actions, plaintiff establishes a defendant's liability by showing that defendant's conduct is a cause in

fact of the harm, and that conduct is breach of legal duty imposed on defendant to protect plaintiff against the particular risk and harm involved; an act will be deemed a cause in fact of an accident when, viewed in light of all evidence, it is concluded that it is a necessary antecedent to plaintiff's harm, without which the accident would not have occurred.

6. Negligence (Key) 4

Generally, under Louisiana law, a person's duty toward another can be stated as the obligation to conform to standard of conduct of a reasonable man under like circumstances.

7. Automobiles (Key) 150

Under Louisiana law, a motorist is under a duty at all times to keep a sharp lookout ahead to discover presence of those who might be in danger.

8. Automobiles (Key) 150, 160(3)

Under Louisiana law, a motorist is not entitled to assume his pathway is clear; rather, he is charged with duty of seeing that which may be observed in exercise of reasonable care, and failure to heed such duty constitutes negligence and such failure imposes liability on motorists for injuries they inflict upon pedestrians in positions of peril upon the roadway.

9. Automobiles (Key) 168(6)

Motorist, who was aware that there was some type of work in progress in intersection which he was approaching, who observed work truck and one of the pedestrian crew members, and who proceeded through the intersection at speed of 35 miles per hour, was negligent under Louisiana law in striking clearly visible cable suspended approximately 18 inches above the road well before

motorist entered the intersection and in causing accident which led to pedestrian crew member's death when his head struck curb as he was dragged behind motorist's automobile after motorist struck the cable, which then wrapped around pedestrian's legs.

10. Automobiles (Key) 150

Under Louisiana law, a motorist who looks and does not see what may be seen by exercise of reasonable care is negligent to same extent as one who does not look at all.

11. Automobiles (Key) 226(1)

Under Louisiana law, contributory negligence is not a defense to a pedestrian's claim for damages sustained as a result of negligence of a motorist.

12. Automobiles (Key) 231

Despite possibility that Department of Highways may have been negligent in failing to use adequate cautionary signals or other safety devices to warn motoring public as the Department ran an electrical cable across an intersection, such factor did not bar motorist's liability for crew member's death occurring as result of motorist's negligence in striking the suspended cable; fact that motorist struck the cable instead of pedestrian was immaterial.

Appeal from the United States District Court for the Middle District of Louisiana.

Before TUTTLE, AINSWORTH and SAM D. JOHNSON, Circuit Judges.

AINSWORTH, Circuit Judge:

In this wrongful death action Virginia Elaine Marcum sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, alleging that her deceased husband Ronney F. Marcum was killed in an accident caused by the negligence of Oscar Kwiterovich, an employee of the United States Department of Labor, acting within the scope of his employment. The parties consented to a trial before a United States magistrate on stipulated facts, depositions, exhibits, memoranda and proposed findings of fact and conclusions of law. After considering the evidence and hearing arguments, the magistrate dismissed plaintiff's case, finding that defendant's employee Oscar Kwiterovich was not negligent; alternatively, decedent Marcum was contributorily negligent; and alternatively, the Louisiana law doctrine of last clear chance was not applicable. Judgment was entered in favor of defendant United States pursuant to the magistrate's oral findings, and the judgment was approved by the district judge. We conclude that the trial court was clearly erroneous in its findings, and accordingly reverse.

The accident occurred at approximately 11:15 a. m. on September 7, 1976 at the intersection of Plank and Evangeline Roads in Baton Rouge, Louisiana. Decedent Marcum was employed as a trades helper by the Louisiana Highway Department, which had sent a crew to work in the area. At the time of the accident, the crew was engaged in running an electrical cable north to south down Plank Road, a four-lane street, from a spool located approximately two blocks north of Evangeline, also a four-lane street. The

cable, black in color and three-quarters of an inch in diameter, was attached to the bumper of a work truck driven by the supervisor of the crew, Paul Treadway. Although there is some dispute as to the direction in which Treadway's vehicle was facing, there is evidence in the record that Treadway was backing down Plank Road so he could observe the cable operations while driving. Marcum and a co-worker, Warren Hurst, were following the truck on foot.

As the truck reached the intersection, the light was green for traffic on Plank Road, and Treadway instructed Hurst to hold the wire and Marcum to try to prevent traffic from striking the cable as the truck pulled it across the intersection. The cable was elevated approximately 18-20 inches from the road surface as it was pulled through the intersection. Although there was some testimony that the truck had its flashing light on prior to the accident and the crewmembers were wearing yellow hard hats, there were no red flags, orange vests or other safety devices being used by the crew at the time.

Immediately prior to the accident, Kwiterovich was proceeding in a westerly direction in the left-hand lane of Evangeline Street in a 1972 Toyota. A trailer truck was traveling in the same lane ahead of him. When he was approximately 200 yards east of the Plank Road intersection, Kwiterovich first noticed some work taking place in the area of the intersection. He observed the Highway Department truck as it was proceeding through the intersection and saw a man following the truck. He noticed the man looking up and assumed the persons at the intersection were involved in doing some overhead work. At a point approximately 50 to 100 yards east of the intersection, Kwiterovich, who testified in his deposition that he thought the trailer truck ahead of him would turn left, moved into the right lane. The traffic light turned green and he proceeded

through the intersection at an estimated speed of 35 miles per hour. He testified that at this time the work truck and pedestrian crewmember had moved to the left and were no longer in his field of vision.

Kwiterovich was looking ahead as he went through the intersection and struck the cable. He did not attempt to brake at first but allowed the car to slow down. The cable became lodged between the front wheels and the body of the Toyota. It came off of the work truck bumper and wrapped around the legs of Marcum, dragging him behind the Toyota approximately 146 feet down Evangeline Street. Marcum's head struck the curb, resulting in his death shortly thereafter at a local hospital. Kwiterovich testified that he never saw the cable and was unaware of it until after the accident.

[1] In actions brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2674, state law where the alleged negligence occurred is controlling. *Ferrero v. United States,* 603 F.2d 510, 512 (5th Cir. 1979); *Simpson v. United States,* 322 F.2d 688, 690 (5th Cir. 1963). Therefore, Louisiana law governs the substantive issues in this appeal.

[2, 3] With regard to our view of the court's factual determinations, the clearly erroneous standard applies. *Alexander v. United States,* 605 F.2d 828, 832 (5th Cir. 1979); *Williams v. United States,* 405 F.2d 234, 239 (5th Cir. 1968); Fed.R.Civ.P. 52(a). However, where the evidence before the trial court consisted solely of depositions and other written matter, the court hearing no live witnesses, the burden of showing clear error is not so heavy as in the case where the court has the opportunity to assess the credibility of witnesses by personal observation. *Cooper v. Department of the Navy,* 594 F.2d 484, 486 (5th Cir.), *cert. denied,* ..... U.S. ....., 100 S.Ct. 266, 62 L.Ed.2d 183 (1979); *Sicula Oceanica, S. A. v. Wilmar Marine En-*

gineering & Sales Corp., 413 F.2d 1332, 1333-34 (5th Cir. 1969). *See also Toms v. Country Quality Meats, Inc.*, 610 F.2d 313, 315 n.5 (5th Cir. 1980); *Village Fair Shopping Center Co. v. Sam Broadhead Trust*, 588 F.2d 431, 434 n.2 (5th Cir. 1979). Thus, where our view of the same evidence from the same vantage point as the trial court leaves us "with a definite and firm conviction that a mistake has been committed," there is clear error and we are bound to set aside the court's findings. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *Ferrero, supra*, 603 F.2d at 512.

[4, 5] One such erroneous finding was the trial court's determination that there was no negligence on the part of defendant's employee Oscar Kwiterovich. This holding is unsupported by the evidence viewed in light of the applicable law. Louisiana law is clear that for a pedestrian to recover against a motorist there must be fault on the part of the motorist which brings about the injury. *Baumgartner v. State Farm Mutual Automobile Insurance Co.*, 356 So.2d 400, 406 (La.1978). *See Mathews v. Allstate Automobile Insurance Co.*, 370 So.2d 1331, 1333 (La.App.2d Cir.), *writ denied*, 373 So.2d 526 (La.1979); *Fitch v. Evans*, 364 So.2d 1309, 1312 (La.App.2d Cir. 1978), *writ denied*, 367 So.2d 392 (La.1979). Under Louisiana's "duty/risk" analysis applicable in negligence actions, plaintiff establishes a defendant's liability by showing that defendant's conduct is a cause in fact of the harm, and that conduct is a breach of a legal duty imposed on defendant to protect plaintiff against the particualr risk and harm involved. *Boyer v. Johnson*, 350 So.2d 1164, 1166 (La.1978); *Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co.*, 242 La. 471, 487-90, 137 So.2d 298, 302-04 (1962). *See Chavez v. Noble Drilling Corp.*, 567 F.2d 287, 288 (5th Cir. 1978). An act will be deemed a cause in fact of an accident when, viewed in light of all the evidence,

it is concluded that it is a necessary antecedent to plaintiff's harm, without which the accident would not have occurred. *Laird v. Travelers Insurance Co.*, 263 La. 199, 209-10, 267 So.2d 714, 717-18 (1972); *Follins v. Barrow*, 354 So.2d 609, 611 (La.App. 1st Cir. 1977), *writ denied*, 356 So.2d 434 (La.1978).

The accident here would not have happened but for Kwiterovich's proceeding through the intersection at Evangeline and Plank Road at an estimated speed of 35 miles per hour, failing to see the cable, which he struck and which in turn entangled Marcum and dragged him to his eventual death. Clearly Kwiterovich's conduct was a substantial factor which had a direct relationship to the accident. *Laird, supra*, 263 La. at 210, 267 So.2d at 718.

[6-8] Our principal inquiry, thus, becomes whether Kwiterovich was under a legal duty to protect decedent Marcum against the particular risk of harm which Marcum encountered and which breach of that duty ultimately led to Marcum's death. Generally, a person's duty toward another can be stated as the obligation to conform to the standard of conduct of a reasonable man under like circumstances. *Straley v. Calongne Drayage & Storage, Inc.*, 346 So.2d 171, 176 (La.1977). Louisiana law provides that a motorist is under a duty at all times to keep a sharp lookout ahead to discover the presence of those who might be in danger. *Baumgartner, supra*, 356 So.2d at 404; *Jackson v. Cook*, 189 La. 860, 868, 181 So. 195, 197 (La.1938). A motorist is not entitled to assume his pathway is clear. *Weber v. Phoenix Assurance Co. of New York*, 273 So.2d 30, 33 (La.1973). Rather, he is charged with the duty of seeing that which may be observed in the exercise of reasonable care. *Jackson, supra*, 189 La. at 868, 181 So. at 197; *Follins, supra*, 354 So.2d at 611; *Welch v. Mayhall*, 325 So.2d 741, 744 (La.App. 1st Cir. 1976). The failure to heed

this duty constitutes negligence and such failure imposes liability on motorists for injuries they inflict upon pedestrians in positions of peril upon the roadway. *Baumgartner, supra,* 356 So.2d at 404; *Guilbeau v. Liberty Mutual Insurance Co.,* 338 So.2d 600, 604 (La.1976); *Jackson, supra,* 189 La. at 868, 181 So. at 197.

[9] In view of these well-established principles, the facts lead to the definite conclusion that Kwiterovich was negligent in striking the cable and causing the accident which led to Marcum's death. The photographs in evidence indicate that the cable was clearly visible against the background of the concrete road surface. At the time of the accident, approximately 11:15 a.m., the weather was clear and the road surface dry. The cable was suspended approximately 18 inches above the road well before Kwiterovich entered the intersection and at the time of impact. Furthermore, Kwiterovich testified in his deposition that he was aware that there was some type of work in progress when he was approximately 200 yards from the intersection. He had observed the work truck and one of the pedestrian crewmembers. Nonetheless, he proceeded through the intersection at a self-estimated speed of 35 miles per hour. Although there had been a trailer truck traveling in the lane ahead of him as he was approaching the intersection, Kwiterovich switched lanes approximately 50-100 yards before entering the intersection and the view in his lane was unobstructed prior to and at the time of impact. Kwiterovich testified that he was looking ahead as he proceeded through the intersection and he did not see the cable at any time before the accident.

[10] A motorist who looks and does not see what may be seen by the exercise of reasonable care is negligent to the same extent as one who does not look at all. *Follins, supra,* 354 So.2d at 611; *Welch, supra,* 325 So.2d at 744.

Although he is not charged with the duty of guarding against unusual or unexpected obstructions which he had no reason to anticipate he would encounter on the road, *Vowell v. Manufacturers Casualty Insurance Co.*, 229 La. 798, 808-09, 86 So.2d 909, 913 (1956); *Parker v. Continental Insurance Co.*, 341 So.2d 593, 594 (La.App.2d Cir. 1977), the circumstances here served to alert Kwiterovich to the particular risk involved and to impose upon him the duty to exercise due care to alter his conduct accordingly.[1] As stated earlier, Kwiterovich admitted that he had observed some work in progress at the intersection as he was approaching it. Though he testified that he reduced his speed at this point, he continued through the intersection, failing to apply his brakes even after striking the cable. Although alerted to the possibility of danger by the activities at the intersection, he failed to bring his automobile under such control as to have stopped if something were in the road. *See Hryhorchuk v. Smith*, 379 So.2d 281, 288-89 (La.App. 3d Cir. 1979). We thus find Kwiterovich was under a legal duty to protect Marcum against the particular risk of harm

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1. In *Page v. Green*, 306 So.2d 847 (La.App.2d Cir. 1975), the Louisiana Court of Appeal held that a motorist was not under a legal duty to protect against striking a winch cable stretched across a rural highway which he did not see and which he had no reason to anticipate. In that case, however, the cable was not placed at an intersection or other point where a motorist is under a duty to guard against the possibility of peril, there were inclement weather conditions which rendered the cable barely visible and the private citizen placing the cable on the road had given no warning other than to wave his hands immediately prior to the motorist's approach while he was standing some distance behind the cable. Furthermore, no pedestrian was injured. Rather, it was the motorist who was injured as a result of striking the cable, and the court refused to find him contributorily negligent. *See also Armstead v. Central Louisiana Electric Co., Inc.*, 308 So.2d 870 (La.App.3d Cir. 1975) (plaintiff who struck a three-eighths inch guy wire on rural highway at night where weather was hazy with patches of fog and wire had not been there on previous evening when he had traveled over same road), *writ refused sub nom. LeNormand v. Hardware Mutuals Casualty Co.*, 246 La. 586, 165 So.2d 482 (1964).

involved and that his conduct constituted a breach of that duty.

[11] In addressing the trial court's finding that decedent Marcum was contributorily negligent, we note that *Baumgartner, supra,* 356 So.2d at 405, made clear that contributory negligence is no longer a defense to a pedestrian's claim for damages sustained as a result of the negligence of a motorist. *Widcamp v. State Farm Mutual Automobile Insurance Co.,* 381 So.2d 937, 940-41 (La.App.3d Cir. 1980); *Hryhorchuk, supra,* 379 So.2d at 289. *See* 53 Tul.L.Rev. 296, 296-304 (1978). In reaching its conclusion, however, the trial court determined that *Baumgartner* was not applicable to the facts of this case, because decedent Marcum was not the type of pedestrian contemplated by the court in *Baumgartner,* since he was working in the intersection rather than merely trying to cross it; also, there was no direct contact between the motorist's vehicle and the pedestrian as in *Baumgartner;* and, finally, that the accident did not occur within a clearly defined pedestrian crosswalk, an important factor in *Baumgartner.*[2] Although the court's distinctions are valid ones, we find that its holding is contrary to the rationale of *Baumgartner,* and that the rule in that case clearly operates to bar the defense of contributory negligence here.

In *Baumgartner,* the Louisiana Supreme Court held that when a motorist approaches a pedestrian crosswalk he must use more than ordinary care to see what is ahead and be prepared for the possibility of people crossing. Since the motorist, rather than the pedestrian, bears the greater burden of caution, a driver is required to discover a pedestrian's peril sufficiently early to take evasive action,

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2. The court also found that *Baumgartner* was not applicable because the motorist in this case (Kwiterovich) was held not to be negligent. But since we have determined that Kwiterovich was in fact negligent, the court's holding is erroneous.

and his failure to do so constitutes fault despite a clear finding of negligence on the part of the pedestrian. 356 So.2d at 404-06. The foundation of the court's holding is that a mutuality of risks is lacking between the pedestrian and the motorist, the latter clearly having the advantage. 356 So.2d at 405.

[12] We find that same mutuality of risks lacking in the circumstances of this case despite the fact that Marcum was working as a crewmember for the Louisiana Department of Highways at the time of the accident. Prior to being struck Marcum had been crossing the intersection of foot, and although doing so in the course of his work, he was a pedestrian nonetheless and clearly in a position of peril. Relative to the oncoming vehicle, he was no less vulnerable than a pedestrian casually crossing the street; he was unquestionably the "less armored member of society" for which Kwiterovich as a motorist on a public roadway was under a duty at all times to keep a vigilant lookout and avoid. *Welch, supra,* 325 So.2d at 744. *See Guilbeau, supra,* 338 So.2d at 603; *Jackson, supra,* 189 La. at 868, 181 So. at 197. Thus, despite the possibility that the Department of Highways may have been negligent in failing to use adequate cautionary signals or other safety devices in the course of their work to warn the motoring public, this factor does not bar defendant's liability in this case.[3]

The trial court's second distinction, that the vehicle did not directly strike the pedestrian as in *Baumgartner,* but rather Kwiterovich's car struck the cable which in

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3. It appears that Marcum, only a trades helper was hardly in a position to be responsible for insuring that the crew employed the proper cautionary measure. Furthermore, there was testimony that the work truck's flashing light was on and that Marcum and the other crewmembers were wearing yellow Highway Department hats at the time of the accident which would serve to provide notice to an approaching motorist that work was in progress creating a potentially hazardous condition.

turn struck Marcum, is clear error. If Kwiterovich had discharged his duty while approaching the intersection to keep a sharp lookout for those in danger, he would have observed the cable which was clearly visible and avoided the impending peril. Further, to draw the distinction here would dilute an important policy underlying *Baumgartner,* to stress the importance of human safety "even for those who are negligently caught off their guard." *Baumgartner, supra,* 356 So.2d at 405. Thus, under these circumstances, the fact that Kwiterovich struck the cable instead of Marcum is immaterial.

Finally, the trial court's holding that *Baumgartner* is inapplicable because there was no clearly defined pedestrian crosswalk at the intersection where the accident occurred is erroneous. Although it is true that in *Baumgartner,* the pedestrian was struck while in a crosswalk, the rationale of that case is equally applicable to the circumstances here. Plank Road had no marked crosswalk; however, Marcum was struck while in an area where pedestrians would likely cross the street. In such a case, Marcum would clearly have the benefit of a motorist's obligation to exercise the degree of care necessitated by the circumstances. To hold that *Baumgartner* is limited to pedestrian-crosswalk accidents would lead to an anomalous distinction which the court plainly did not intend to draw. *See Widcamp, supra,* 381 So.2d at 940-41; *Hryhorchuk, supra,* 379 So.2d at 289.

In determining that Kwiterovich was negligent and that the defense of contributory negligence was not available to defendant in this case, we find it unnecessary to address the trial court's holding that the doctrine of last clear chance was not applicable.

Liability having thus been established by our decision herein, the case must be remanded to the trial court for a determination of plaintiff's damages.

REVERSED AND REMANDED.

APPENDIX 9

"IX

"That on the date and at the time of the said collision, November 23, 1971, your plaintiff, H. H. Henderson, had no notice that his public liability policy having been issued by the defendant, policy #2CC 637846, had not been renewed, he had no notice nor was he ever advised by the defendant of any intent to cancel the coverage prior to the date of the accident 11/23/71. Had he been so advised prior to the accident or the expiration date he could have obtained such coverage from other sources. He was at all times and in all ways relying upon coverage that would have been provided by the renewal of the said policy. Since said collision occurred after working hours and in the early part of the night on November 23, 1971 your plaintiff, H. H. Henderson, the next day thereafter notified the defendant of said accident by notifying their agent, Sigler Insurance Co. of same. Nothing was mentioned of any cancellation of coverage. A day or so after this notification your plaintiff, H. H. Henderson, received a notice of non-renewal of policy #C 3111037 which expired 10/7/71, a copy of which is hereto attached as Exhibit "C-2" and made a part hereof, but which policy is in no way connected with the coverage claimed and coverage herein involved. Your plaintiff has never received notice of non-renewal or cancellation of policy #2CC 637846 providing $50,000/100,000/25,000 coverage."